

NO. 3589

IN

**The United States Circuit
Court of Appeals**

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, formerly
KATHRYN SMITH,
Appellant,

VS.

HARRY B. HILL,
Appellee.

MOTION FOR RULE TO SHOW CAUSE

WM. P. LORD, of Portland, Oregon,
Solicitor for Appellant.

JOHN W. ROBERTS, of Seattle, Washington,
Solicitor for Appellee.

FILED

AUG 16 1920

**F. D. MONCKTON,
CLERK,**

NO.....

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vs.

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Appellee.

MOTION FOR RULE TO SHOW CAUSE

Now comes the above named claimant and prays for an order of this Court directed to the Honorable Edward Cushman, U. S. District Judge for the District of Washington, at Tacoma, Washington, that he be required to show cause at a time certain to be fixed by this court, why he should not approve the record of the evidence and proceedings in the above entitled cause, as held before him as District Judge, in equity sitting, and if the evidence and record lodged with the clerk by appellant be not complete or properly prepared for the purpose of the appeal, that the same shall be so made under the direction of the said Judge.

This motion is based on the following facts, to-wit: That after the issues were made in the said suit, in the said District Court, the same was tried before said Judge on the 29th day of October, 1919.

Thereafter and on the 20th day of November, 1919, a decree in said cause against the complainant was entered.

Thereafter, and on the 18th day of May, 1920, the said District Judge allowed an appeal to this Court, in said cause, upon the filing of a petition for an appeal, bond, assignment of errors, and citation on appeal.

That at the time of perfecting the appeal as above set forth, the complainant had not filed with the clerk of said District Court any statement of the evidence in said suit contemplated by Rule 75 of the Equity Rules promulgated by the U. S. Supreme Court at the October term, 1912.

Thereafter, and on the 10th day of June, 1920, the appellant filed with said District Clerk, a motion praying for a settlement of the record in said cause, and relieving the appellant from any default for failure to lodge the record with the clerk before the allowance of the appeal.

That a copy of said motion is hereunto attached marked exhibit "A" and hereby made a part of this motion. That said motion having been regularly served

on John W. Roberts, solicitor for respondent, the same was set for hearing, by the said District Judge, for June 28, 1920.

That thereupon, said motion was argued to the Court, and after hearing the arguments of counsel, said Judge made an order denying the said motion and refusing to approve the record, because the same had not been filed within 10 days after the entry of the decree in said cause, or within any extension of time allowed by the Court.

That prior to the argument of said motion complainant tendered appellee in open Court a full and true transcript of the testimony in said cause certified to by the Court reporter.

Respectfully submitted,

WM. P. LORD,
Solicitor for Appellant.

“EXHIBIT A”

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

<p style="margin: 0;">KATHRYN STRUETT, formerly KATHRYN SMITH, <i>Complainant,</i></p> <p style="text-align: center; margin: 5px 0;">vs.</p> <p style="margin: 0;">HARRY B. HILL, <i>Respondent.</i></p>	}	<p style="text-align: center; margin: 0;">E-85 MOTION</p>
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Now comes the complainant above named and moves the Court for an order as follows:

(1) For an order permitting complainant to and including the 10th day of July, 1920, as time within which to file a record of the proceedings in this cause with the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit.

(2) For an order relieving complainant from any default in settling the record in this cause and permitting the statement of complainant's case in the form of questions and answers.

(3) For an order permitting complainant to have the privilege of filing a bond on appeal satisfactory to the respondent herein.

This motion is based upon the affidavit of Wm. P.

Lord, hereunto attached, marked Exhibit A, and by this reference made a part of this motion.

WM. P. LORD,
Attorney for Complainant.

EXHIBIT A

UNITED STATES OF AMERICA }
County of Oregon, } ss.

I, Wm. P. Lord, being first duly sworn, depose and say that on or about the 15th day of May, 1920, I requested A. D. Hoflin, the reporter who took the testimony in this cause to present to the Judge of the above entitled Court for signature the following papers for the perfection of the appeal in this cause, to-wit: Petition for Appeal; Order Allowing Appel; Assignments of Error; Citation on Appeal and Undertaking on Appeal, together with proposed orders as follows:

“IT IS ORDERED that the time for the said complainant to file the record of appeal in the above entitled cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and to docket the said cause with said clerk, be and the same is hereby enlarged and extended for a period of 17 days up to and including the first day of July, 1920.

“Dated this 17th day of May, 1920.”

"IT IS ORDERED that the complaintant-appellant be, and she is, hereby allowed in her preparation and statement of the evidence on her appeal herein, to state such portions of the testimony of the witnesses in the above entitled cause in the exact words of the witnesses and in the form of the questions asked said witnesses and their answers thereto, as in the judgment of said appellant is necessary to preserve the true character and meaning of the testimony of such witnesses and such as the appellant may desire.

"Dated this 17th day of May, 1920."

That previous to this date and on the 20th day of April, 1920, I had requested Mr. Hoflin to prepare a transcript of the testimony in this cause and had also advised Mr. John W. Robert of counsel on the 15th day of May, 1920, that application for appeal would be made in this cause and enclosed him copy of all the papers as appear above set forth, including the proposed orders for extension of time to the first day of July, 1920 as time within which to file the record with the clerk of the Court of Appeals; that these papers were received by Mr. Roberts prior to the 18th day of May, 1920; that Mr. Hoflin requested Mr. Roberts to approve the foregoing orders and that he refused to do so; that he also so stated to Judge Cushman and that Judge Cushman would not sign the order for extension of time unless it was brought up by motion with notice to Mr. Roberts; that additional time was requested because Mr. Hoflin

had not completed transcribing the stenographic notes of the testimony taken in this cause on the 15th day of May, 1920, and did not complete the same until the 27th day of May, 1920; that I was required to attend the U. S. Circuit Court of Appeals in San Francisco during the May term and as a result I was away from my office for a considerable period of time during the month of May and I did not return to the city until the 11th day of May, 1920; that I did not know that Mr. Hoflin had not proceeded to transcribe the notes in this cause pursuant to my letter of April 20, 1920, above referred to until my return from San Francisco; when I returned to the city I found a letter from Mr. Hoflin making inquiries about the time limit for taking appeal; that immediately upon my arrival in Portland, it was necessary for me to perfect proceedings for a writ of error in the case of U. S. v. Vaughn, or otherwise the right to review would have been lost to the defendant in that cause; that I also had to prepare to try an embezzlement charge in the case of State v. Galloway; and as soon as I completed the perfection of that appeal I immediately proceeded to prepare the papers in this cause; that by reason of the foregoing facts I was exercising due diligence in taking this appeal and this appeal would have been perfected if it had not been for the fact that Mr. Heflin had not transcribed the stenographic notes in this cause pursuant to my letter of April 20, 1920; but he was of the opinion that the time for filing the appeal in this cause had elapsed by reason of the fact that he

computed the time from the 29th day of October, the date of the trial, instead of the 20th day of November, the date of the entry of the decree in this cause, and had written me making inquiries as to whether he should proceed with the making of the transcript, although I had already paid for the same, having sent the necessary moneys to cover the cost of the transcript in my letter of April 20; consequently there is no intention to delay this appeal; that on May 29th I asked Mr. Roberts to stipulate with me that instead of a statement of the evidence being made in this cause, the questions and answers of the respective witnesses might be used, so as to preserve the true meaning of the testimony and on June 2nd I received a reply from Mr. Roberts, as follows:

Re: Struett vs. Hill

This will acknowledge receipt of your letter of May 29th with stipulation in relation to a bill of exceptions. I am returning you herewith this stipulation for the reason that your time for making and settling a bill of exceptions in this case has expired and I, therefore, cannot consent to anything in connection with the matter of either preparing or settling a bill of exceptions for appeal in this case.

“Not waiving the question of time or jurisdiction, I am willing here to state to you that if you can now procure a record at all in the case I will then consent that it may go up in the manner which you have suggested, and in fact, would very much

prefer if it goes up at all that it should go in that form, but expressly reserve the right when you shall present this matter to the court to object to any record being now made or settled in the cause."

Notarial (Signed) WM. P. LORD.

Seal

"Subscribed and sworn to before me this 10th day of June, 1920.

"ALLISON MOULTON,

"Notary Public for Oregon.

"My commission expires May 13, 1924."

(Copy served on John Roberts, solicitor for respondent, by mail.)

